IN THE

# Supreme Court of the United States

October Term, 1958.

No. 45

BEACON THEATRES, INC., a corporation,

*Petitioner,*

vs.

THE HON. HARRY C. WESTOVER, Judge of the United States District Court of the Southern District of California, Central Division, Fox West Coast Theatres Corporation, Pacific Drive-In Theatres, Inc.,

*Respondent.*

## REPLY BRIEF OF PETITIONER.

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## TABLE OF AUTHORITIES CITED

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## REPLY BRIEF OF PETITIONER.

In assessing the issues as they are now framed, it is significant to note the contentions in the brief filed by respondent's attorneys in response to the main argument in petitioner's brief.

### A.

Petitioner said: The right to jury trial with respect to a suit for declaratory relief is to be determined by a decision as to the character of the suit for which the declaratory action is a substitute. The instant suit seeking a declaration that clearance between the California and Bel-Air would not constitute a basis for a treble damage antitrust suit is a substitute for that treble damage

antitrust suit. Therefore, petitioner had a right of jury trial as to the issues of clearance and competition in the declaratory relief suit.

Respondent replies by arguing that "the complaint does not pray for a declaratory judgment of non-liability to the charges of antitrust violation contained in the counterclaim subsequently filed (Resp. Br. p. 9) and later says *"had the counterclaim alleged simply an unreasonable restraint in that the distributor was granting the Fox Theater clearance over the Drive-in when the theaters were not in competition with each other, a 'Dickinson' or 'McDonald' situation might well have been presented."* (Resp. Br. p. 38.) The "Dickinson" and "McDonald" situation referred to are the cases of *Dickinson v. General Accident Fire and Life Assurance Company,* 147 F. 2d 396, and *Pacific Indemnity v. McDonald,* 107 F. 2d 446, wherein, following the generally accepted rule, the Court of Appeals for the Ninth Circuit held that a suit for declaratory relief may not be substituted for a suit for coercive relief and by that substitution alone destroy the right of jury trial.

Petitioner replies that this concession, emphasized above, precisely covers this case. Looking at the complaint alone —and respondent now proposes to try the complaint alone —had petitioner filed only a general denial and demand for a jury trial, the demand must have been honored. The concession demonstrates that petitioner would have been entitled to that jury trial because the complaint was a substitute for an antitrust damage claim alleging that there was an unreasonable restraint of trade in that the distributors were granting the Fox Theater clearance over the Drive-in. Standing alone, therefore, the complaint

was triable to a jury and the order striking the demand was error.

A fortiori, when the counterclaim raised the *same* issue as one of the issues to be tried to a jury, this constitutional right is protected.

Of course, as a matter of theory, it is unimportant whether a jury trial as to the issue of unreasoable restraint is deemed to be the *sole* issue in the complaint or *one* issue in the counterclaim. Rule 42(b) provides ample authority for a trial court to direct the separate *jury* trial of one of a number of *jury* issues encompassed either by a complaint or by a counterclaim. The power to try this issue separately to a jury, which power Fox West Coast has never sought to invoke, defeats the weak contentions made in respondent's brief to the effect that the unreasonable restraint issues must necessarily confuse the jury as to other antitrust issues.

B.

Petitioner argued that the allegations in paragraph XII of the complaint could not convert the action for declaratory relief into an action to be pigeon-holed "in equity" because (a) those allegations were essential allegations to valid pleading of the declaratory relief claim and (b) no equitable claim was stated because the complaint on its face negated that petitioner was unwilling to test its claim of antitrust violation in court. Even if it were argued that there are *both* declaratory relief issues *and* equitable issues in the case, it is clear that the declaratory relief issue is that of unreasonable restraint while the so-called "equitable" issue, at best would be only whether there was a good-faith claim or a "threat" by petitioner that clearance over this theater would violate the antitrust

laws. It is now well established in the lower Federal courts that if a complaint alleges facts giving rise to a jury trial claim at law and equitable issues are also raised, the legal issues are for the jury and the equitable issues are for the court.

*Ring v. Spina* (C. C. A. 2d, 1948), 166 Fed. 546;
5 Moore's *Federal Practice*, 2d, pp. 143 to 163.

Similarly, here the claim for declaratory relief which is a substitute for the antitrust jury suit is triable to a jury while, giving the contentions in respondent's brief the most favorable interpretation, only the "equitable issue" as to the good faith of petitioner's alleged threats of an antitrust suit would be triable to the court.

C.

Petitioner argues that, assuming that Fox West Coast's remedy at law was inadequate at the time the complaint was filed because of the unalleged uncertainty as to whether petitioner would ever sue at law, that this uncertainty was promptly resolved by the filing, in due course, of the counterclaim. Respondent replies by urging a so-called maxim of the law of equity that although an inadequate remedy at law is made adequate by future events, the test must be applied mechanically at the time of suit even though the constitutional right of jury trial is the victim of the mechanical rule. The answer is found in the decision by Judge, later Mr. Justice, Rutledge in *Prudential Insurance Company v. Saxe*, 134 F. 2d 16, 32. The court held that under the Federal Rules of Civil Procedure, the inadequacy of a remedy at law which arises because the law action has not been filed is cured when, in fact, that action is filed by way of a counterclaim. As the court held, to rule otherwise would be in effect to deprive the

claimant of the right to jury trial, making the filing of the suits a race of diligence and do those things when the fact which renders the remedy inadequate does not exist.

A different ruling would of course provide such a simple device for the destruction of the right of jury trial as to make possible the most serious evasion of the Seventh Amendment. A prospective defendant need only sue for declaratory relief and allege that the declaratory relief defendant has threatened a suit at law and irreparable injury is resulting and, automatically, the right to jury trial of substantive issues is lost. The result has been forbidden by this court beginning at least with *Russell v. Clarke Executors*, 7 Cranch 69, 3 L. Ed. 271. There the Court held that although bills of discovery were a basis for equitable jurisdiction, "this rule cannot be abused by being employed as a mere pretext for bring causes properly before a court of law into a court of equity." (7 Cranch 69, 89, 3 L. Ed. 271, 279.) See also:

*Hipp v. Babin*, 19 How. 271, 15 L. Ed. 663;

*Scott v. Nealy*, 140 U. S. 106, 11 S. Ct. 712, 35 L. Ed. 358;

*Clark v. Roller*, 199 U. S. 541, 26 S. Ct. 141, 50 L. Ed. 300;

*Buzard v. Houston*, 119 U. S. 847, 30 L. Ed. 541.

Thus if it be true that equitable relief against an action at law is sound, it is also true that where allegations of threats of an action at law would deprive a litigant of the right to jury trial as to substantive issues, when the action is in fact filed, the remedy at law is then adequate, and the mode of trial of those issues is by jury. If thereafter injunctive relief is called for, that remedy is still available.

D.

The brief on behalf of respondent urges this court to affirm the order below upon the grounds that relief by way of mandamus in the Court of Appeals is an inappropriate remedy in this case. The cases supporting mandamus as an appropriate remedy for petitioner here are cited at page 3 of petitioner's opening brief herein. However, it is respectfully submitted that no issue could be less appropriate for this court to determine now than the issue as to the availability of mandamus in the Court of Appeals. That court in this case specifically held that it did not reach that question [R. 125]. For this court to rule now would be anticipatory in the extreme.

Mandamus in the Court of Appeals, this court has held, is first to be decided by the exercise of that court's discretion. (*La Buy v. Howes Letter Co., Inc.*, 352 U. S. 249, 255.) Abuse of that discretion, if exercised, may or may not be ultimately reviewed here, but essential rules of practice of this court would be overturned if, before that discretion had been exercised, this court would rule as to the appropriateness thereof.

**Conclusion.**

This case presents the question as to whether a bona fide procedural device, *i.e.*, declaratory relief, may be converted into a tactical weapon against the constitutional right of jury trial by judicial interpretation of rules of pleading and practice in a manner which would undermine the application of the Seventh Amendment to civil actions in the Federal courts. Petitioner submits that Rule 42(b) as an implement for the effective and efficient administration of the courts, need not be construed in such a manner as to diminish rights guaranteed by the Seventh Amend-

ment to the Constitution of the United States and that outmoded maxims of equitable jurisprudence of doubtful history need not be permitted to invade the right to jury trial.

Wherefore, petitioner prays that the Order of the Court of Appeals denying the Petition for Writ of Mandamus be reversed and the case remanded to the Court of Appeals with directions (a) to issue the Writ of Mandamus as prayed for in the petition to the Court of Appeals or in the alternative (b) for further proceedings upon the Petition for Writ of Mandamus in accordance with this court's order and opinion.

Respectfully submitted,

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